

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 81C/10  
5302515

BETWEEN

ALANA ADAMS  
Applicant

AND

WELLINGTON FREE  
AMBULANCE SERVICE  
INCORPORATED  
Respondent

Member of Authority: G J Wood

Representatives: Tim Blake, for the Applicant  
Paul McBride, for the Respondent

Investigation Meeting: By way of submissions received

Submissions Received: By 10 November 2010

Determination: 7 December 2010

---

**SUPPLEMENTARY DETERMINATION OF THE AUTHORITY**

---

[1] This determination is to deal with outstanding issues as to remuneration to be awarded to the applicant, Ms Adams, and costs. The claim for remuneration involves the calculation of 17 weeks ordinary pay less earnings and less contribution. The issues of costs relate to the claim for interim reinstatement, which was ultimately dismissed by the Employment Court, for a stay to the Authority's prior determination, and on the substantive determination.

[2] In my substantive determination, I concluded that Ms Adams had been unjustifiably dismissed by the respondent, Wellington Free Ambulance Service (WFAS). However, because of subsequently discovered misconduct and a significant contribution to the situation that gave rise to her personal grievance for unjustified dismissal, I declined reinstatement and reduced substantially Ms Adams's remedies, in effect by 60%.

[3] I noted that Ms Adams was entitled to claim remuneration on the basis of an average of her last three months total earnings (given the regular working of overtime) and that leave was granted to the parties to revert to the Authority should they be unable to agree on the calculation of that figure, which they have not.

[4] This calculation is therefore on the basis as noted in the determination that Ms Adams had lost pay for 17 weeks, which was to be calculated on the above average, then reduced by her lost earnings, and then reduced by 60%. I will deal with each claim in a date ordered manner.

### **Costs on the Application for Interim Reinstatement**

[5] WFAS being ultimately successful is entitled to costs for this matter. WFAS seeks \$5,000, plus disbursements, towards its total costs of \$6,358.50 plus disbursements of \$1,083.94. I note that a significant amount of that claim relates to mediation and other assistance over disciplinary issues.

[6] I accept that, like any claim for interim reinstatement, a great deal of material had to be prepared at short notice. On the other hand, the investigation meeting time is minimal in such cases, including this one.

[7] In all the circumstances of the case I consider a contribution to costs of \$1,500 is appropriate, given that WFAS was ultimately successful. The only identified disbursement other than legal advice, for which costs have already been awarded, is an unexplained claim for administration costs of \$26.44. Such claims are not normally awarded without proper documentation. I therefore decline to make any award for disbursements.

### **Application for Stay**

[8] WFAS was granted a stay while it challenged the interim order for reinstatement, a challenge in which it was successful. The stay meant that WFAS was not required to have Ms Adams at the workplace during that period before the Court could issue its judgment.

[9] WFAS seeks \$500 as a contribution to costs of an unnamed amount. Given that the grant of the stay was an indulgence and the limited amount of work required I decline to award any costs in respect of this application.

### **Lost Remuneration**

[10] On behalf of Ms Adams, Mr Blake seeks \$8,518.94 gross for the 17 weeks, on the basis of \$23.51282 @ 42 hours per week x 17 = \$16,788.15, plus holiday pay of \$535.20, minus \$626 alternative earnings, all reduced by 60%.

[11] WFAS claims that the appropriate award would be \$6,800 less earnings.

[12] The issue of holiday pay is irrelevant to the calculations ordered by the Authority. No claim for holiday pay has ever been formally made. One would have expected WFAS to have paid Ms Adams her holiday pay when she left because that is the law. It can not now be claimed in these proceedings, because they are limited to issues of costs and 17 weeks' lost remuneration, less earnings and contribution.

[13] I assess 17 weeks' earnings at \$16,788.15 as claimed by Ms Adams. I then reduce that by \$626 for alternate earnings, totalling \$16,162.15. I make no allowance for holiday pay because holiday pay is not payable on lost remuneration awarded by the Authority after an employee has been dismissed. Reducing that sum by 60% gives an award for lost remuneration of \$6,464.86 gross.

### **Costs for the Substantive Investigation**

[14] WFAS has been ordered to pay Ms Adams the sum of \$4,000 compensation and \$6,464.86 gross in lost remuneration. Both parties now seek costs even though Ms Adams was successful in her claim for unjustified dismissal.

[15] WFAS seeks costs in reliance on a *Calderbank* offer made on 26 May 2010, some 20 days before the first investigation meeting date on the substantive application. In that *Calderbank* letter, WFAS indicated that it would be entitled to a likely order of \$8,000 in aggregate for costs in the Employment Court and Authority for the ultimately unsuccessful claim for interim reinstatement. The offer was made open for only five days in order to avoid legal costs, given the timetable put in place by the Authority for the provision of witness statements and relevant documentation. The offer was therefore put in the following format:

- (a) *Our client would pay to yours the sum of \$7,000 in terms of s.123(1)(c)(i) of the Employment Relations Act 2000;*
- (b) *Our client would make a contribution towards Ms Adams' costs in the sum of \$1,000, noting that the costs incurred to date are almost entirely in relation to the failed application*

- for interim reinstatement – in respect of which our client is entitled to recover costs;*
- (c) *Our client would waive its existing entitlement to costs against Ms Adams ...;*
  - (d) *While not accepting that it has acted other than properly, to acknowledge that Ms Adams believes that she was unjustifiably dismissed, and that as a result of her dismissal, she experienced distress;*
  - (e) *If Ms Adams would wish, then her dismissal can be reclassified as a resignation, effective from the same date. We note that Ms Adams deposes in her evidence that in such a circumstance St Johns would be prepared to engage her (eliminating a claim of career destruction);*
  - (f) *The settlement would be in full and final settlement of any claim that Ms Adams has or might have had arising out of or relating to her employment with our client, including termination of that employment. Payment would be strictly confidential and otherwise on standard Mediation Service terms, extending to be made without admission of liability.*

[16] Ms Adams made a subsequent offer, described as being without prejudice as to costs, one term of which would have been the withdrawal of the claim for reinstatement. However that offer would not have resolved all matters and the ensuing investigation would not have been as limited as Ms Adams claimed, because WFAS would still have been entitled to provide evidence of Ms Adams being *difficult to work with*, because contributory fault has to be assessed by the Authority. For the above reasons I take no account of that offer.

[17] Later Ms Adams was required to pay costs and disbursements of \$4825 in the Employment Court, and \$1500 here, in respect of the claim for interim reinstatement. The net position for Ms Adams therefore is that after the Authority's substantive determination but before costs for that determination are assessed, she has succeeded in monetary terms to the tune of \$4,139.86 (with tax on the remuneration claim yet to be deducted). On the other hand, if she had accepted the *Calderbank* offer, she would have been a net \$8,000 ahead and would not have had to incur legal costs for what turned out to be a five day investigation meeting. I accept that the offer was made in sufficient time for considered acceptance, given the urgent nature of the case. I also accept that the offer contained more than just financial compensation, on the basis that the parties could have from then on treated the termination of her employment as by way of resignation. I therefore accept that WFAS's offer was effective.

[18] The Court of Appeal has counselled the employment institutions to be *steely* in relation to *Calderbank* offers (see *Health Waikato Ltd v. Elmsly* [2004] 1 ERNZ 172). The Court of Appeal has also held that the public interest in the fair and expeditious

resolution of disputes would be undermined if a party were able to ignore a *Calderbank* offer without any consequence as to costs: *Blue Star Print (NZ) Ltd v. Mitchell* [2010] NZCA 385.

[19] WFAS claims near indemnity costs (after deductions by counsel to WFAS) of \$25,000, plus disbursements. Just because a *Calderbank* offer should have been accepted and therefore WFAS is entitled to claim costs does not, however, mean that indemnity costs apply - see for example *NZEPMU & Ors v. Zeal 320 Ltd and Air New Zealand Ltd* (unreported, Travis J, AC27A/09, 22 December 2009), and the principles for indemnity costs set out by the Court of Appeal in *Bradbury v. Westpac Banking Corporation* [2009] 3 NZLR 400. In this respect it needs to be remembered that Ms Adams was in fact successful in her claim for unjustified dismissal.

[20] I conclude that there is no need to deviate in any particular way from the tariff-based approach of the Authority on costs, except in relation to the length of the investigation meeting and the financial position of Ms Adams. A five day investigation meeting would normally result in a costs award to the successful party of between \$7500-15,000. However, five days for an investigation meeting on an unjustifiable dismissal is extreme and is certainly the longest investigation meeting held by this Authority Member in ten years of practice.

[21] The reasons for this were twofold. First, there was the insistence by WFAS on providing evidence from more than ten co-workers from Ms Adams who claimed to not want her to return. However the crucial evidence against reinstatement was given by one witness (who was not a co-worker) and that evidence in itself was damning without the need for the many others.

[22] Second, there was the urgency within which this matter had to be dealt with, given the claim for reinstatement. This meant that the evidence took a lot longer than usual to hear because no evidence in reply was produced in writing and could thus not be efficiently responded to. This matter also took longer than it should have because of extensive questioning by both parties that added little of value to the Authority's questions. Thus both parties must take responsibility for the ensuing lengthening of the investigation meeting.

[23] This matter should have taken no more than three days to investigate at the maximum, but I am prepared to make an allowance of four days on the basis of the delays due to urgency, necessitated by the genuine claim for reinstatement.

[24] That therefore leaves a claim of between \$6,000-12,000 as the appropriate range. I accept that Ms Adams is virtually impecunious, being supported financially as she is by her parents, and she would therefore be unable to pay a significant sum in costs. However, she is now in work and no doubt has been paid the remedies awarded by the Authority, or will be very soon. I also accept that Ms Adams may be able to pay any sums owing over time. I therefore consider that an appropriate contribution to WFAS's costs for Ms Adams to pay is \$6,000. Even then an instalment plan may need to be entered into by the parties.

[25] The claim for disbursements covered expenses incurred by two witnesses who were not WFAS employees and who lived outside Wellington. Mr Stowers was a key witness and I allow the expenses claims, totalling \$280.58, for him. By contrast the other witness was not a key one and had other reasons to attend Wellington at that time. I therefore decline that claim for expenses.

[26] I therefore order the respondent, Wellington Free Ambulance Service Incorporated, to pay to the applicant, Ms Alana Adams, the sum of \$6464.86 gross in lost remuneration. I also order the applicant to pay the respondent the sum of \$7500 in costs, plus \$280.58 in expenses.

**G J Wood**  
**Member of the Employment Relations Authority**